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BOOK REVIEWS

LIVING THE AMERICAN DREAM: A REVIEW OF JOHN HART ELY'S *ON* *CONSTITUTIONAL GROUND*

*John D. Feerick**

I was privileged to be asked by the editors of the *Notre Dame Law Review* to review Professor John Hart Ely's book, *On Constitutional Ground*.¹ I was surprised by the invitation, however, since I have not been actively engaged in the discussions of the academy on the role of the Supreme Court, or more precisely, what theory of constitutional interpretation should be used by the Court in discharging its reviewing function. I confess that I initially thought the invitation was intended for one of the several constitutional law theorists on my school's faculty. When I realized that I did not have an "out" on this ground, I concluded that I had little choice but to take on the challenge of reviewing this book by one of the formidable constitutional theorists of this century. If anything, I wanted to prove to myself that Professor Ely's observation about law school deans is wrong (I'm not sure I succeeded!): "As they approach middle age, law professors tend to deny their dwindling creativity by becoming deans . . . or some other form of jackanapes."²

Having read the book twice, and certain parts more than that, I am glad I had the opportunity to do this review, even if it did ruin my summer, so to speak. I put it this way because I quickly became absorbed in the subjects treated in the book and was tempted to reach out for the other writings of the author referred to throughout the

* I acknowledge the special assistance I received from Griffin Reidy, a student at Fordham Law School, with respect to the 1996/97 term of the Supreme Court; and other assistance from my colleagues, Robert Cooper, Esq., Michele Falkow, Esq., and Mr. Gregory Blackman.

1 JOHN HART ELY, *ON CONSTITUTIONAL GROUND* (1996) [hereinafter *GROUND*].

2 *Id.* at 474 n.10.

book. I particularly recommend this book for anyone who has an interest in becoming more engaged in the tantalizing constitutional and non-constitutional issues of our day, and certainly for anyone who follows or would like to know more about John Hart Ely. The book is an especially good introduction for anyone seeking to be brought up to date on issues of constitutional law. It is masterful in accomplishing that purpose. I need to caution, however, that the book is not easy to read or, for that matter, to review because it deals with an extraordinary number of subjects; indeed, it almost runs the gamut of an entire law school curriculum.

Consider the subjects treated in the book's carefully written and meticulously footnoted 507 pages: federalism, separation of powers, freedom of expression, religious freedom, criminal procedure, racial discrimination, substantive due process, candor, and many other subjects within each of these broad categories. More specifically, the author touches on such interesting subjects as President Clinton's use—inappropriate as he sees it—of the Constitution to abolish the military's ban on gays and the President's exercise of military force in Bosnia, Haiti, and Somalia; whether a President can be indicted prior to being impeached; the importance of the "reasonable doubt standard" despite the "unsettling outcome" of the O.J. Simpson trial in Los Angeles; the high standards that should apply to educational institutions in the conduct of student discipline; the shortcomings of the English Rule against contempt of court limiting what the media can publish concerning the administration of justice; the French system of investigating crimes; the incompleteness of certain aspects of the Warren Commission Report because of its dependence on the government's then existing investigative agencies; the use of lies to gain career advancement, with particular comments on Justice Clarence Thomas and Professor Anita Hill; and the "futility" of believing that Supreme Court nominees can be judged "on anything other than their politics."

I found especially well done Professor Ely's treatment of the Constitution's bill of attainder provision³ and his analysis of the Supreme Court's decision in *United States v. Lovett*,⁴ which struck down a con-

3 U.S. CONST. art. I, § 10.

4 328 U.S. 303 (1946). His fascination for the bill of attainder appears to have developed in law school and then reached its pinnacle when he clerked for Chief Justice Warren. As a clerk, he contributed to the Court's decision in *United States v. Brown*, 381 U.S. 437 (1965), which invalidated a congressional statute based on the bill of attainder provision. See Professor Ely's treatment of the subject in Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962).

gressional statute prohibiting federal money from being used to pay the salary of three individuals named in the law. I recommend for every trial advocacy teacher, as well as other members of the academic community, his incisive step-by-step critique of the case strategy and development of *United States v. Lovett*. I also found splendid his chapters on freedom of expression and religious freedom and his treatment of reverse discrimination and affirmative action.⁵ There is much in these chapters for contemporary America, though the material included was actually written in the context of the 1960s and 1970s.

I must admit, however, to having had difficulty working through parts of the chapter on federalism dealing with the "irrepressible" *Erie Railroad v. Tompkins*⁶ and choice-of-law theorizing.⁷ Interestingly, he anticipated that possibility by noting his own difficulty in finding enforceable principles of federalism. But he is not ambiguous about where he is going because he expresses a strong preference for leaving more subjects to state regulation and for the Supreme Court "keeping the federal government from attaining plenary legislative power."⁸ I found his views on criminal procedure to be powerfully presented with respect to the exclusionary rule and the need to reconsider the decision in *Harris v. New York*,⁹ which allowed incriminatory statements made without a lawyer to be admitted into evidence. His sensitivities to the rights of criminal defendants are manifested throughout the book. He comments on the need for judges to take steps to ensure the integrity of trials in the face of prejudicial publicity, deplores the Supreme Court's cutback on post-conviction reme-

5 GROUND, *supra* note 1, at 188-97, 247-78.

6 304 U.S. 64 (1938). Professor Ely persuasively argues that when a matter is covered by a Federal Rule, the relevant reference point in determining whether state or federal law applies should be the Rules Enabling Act of 1934 and not *Erie*. His discussion of that Act and various Supreme Court cases (including *Hanna v. Plumer*, 380 U.S. 460 (1965)) is quite helpful. See GROUND, *supra* note 1, at 50-61.

7 He casts a cold eye on the view that "states have a greater interest in advancing the interests of their own than they have in advancing the interests of outsiders." GROUND, *supra* note 1, at 65. He therefore rejects a choice-of-law system based on that premise and instead expresses a preference for the law of a common domicile or the joint law of the domiciles of the plaintiff and defendant. See John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

8 GROUND, *supra* note 1, at 32-33.

9 401 U.S. 222 (1971); see GROUND, *supra* note 1, at 211-30. My colleague, Professor James Kainen, joins Professor Ely in making a strong case for eliminating the impeachment exception to *Agnello v. United States*, 269 U.S. 20 (1925), finding that "the scope of exclusionary rules . . . raises meaningful normative questions about the constitutional integrity of the criminal process and not the unavoidable evidentiary costs of that integrity." James L. Kainen, *The Impeachment Exception to the Exclusionary Rule: Policies, Principles and Politics*, 44 STAN. L. REV. 1301, 1372 (1992).

dies, and urges that at the time of guilty pleas judges should make a thorough inquiry into the facts and bargains. I was touched by his defense of public defenders, with which I agree, and found poignant his search for the Bay Harbor Poolroom, the site of Gideon's alleged burglary. His latter treatment, as well as other parts of the book, suggest to me that Professor Ely has a literary talent that may one day express itself in a prize-winning novel or two—not unlike John Grisham's stories of the law.

His views on the subject of flag desecration were prescient given that they preceded by fifteen years the Supreme Court's decisions in *Texas v. Johnson*¹⁰ and *United States v. Eichman*.¹¹ "Orthodoxy of thought," he declared, "can be fostered not simply by placing unusual restrictions on 'deviant' expression but also by granting unusual protection to expression that is officially acceptable."¹² Compare Justice Brennan's statement for the Court in *Johnson*: "We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today,"¹³ and his statement in *Eichman*: "Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering."¹⁴

Professor Ely's postscripts and commentaries throughout the book are worth the purchase price. In addition, the book contains a number of interesting anecdotes which I have not seen elsewhere. For example, he mentions a time when he recommended a female law clerk to Chief Justice Warren, a recommendation to which the Chief listened with restraint and then "noted (among other things) that he worked very closely with his clerks and wondered what this might put her (and others) in a position to accuse him of."¹⁵ Ever apologetic for the Chief, whom he greatly admired, Professor Ely adds, "[H]e was seventy-three years old and thus no one would listen to charges of sexual impropriety anyhow . . ."¹⁶ He also records an encounter with Justice Tom Clark concerning the subject of bills of attainder. Justice Clark, who dissented in *United States v. Brown*,¹⁷ said to him while the case was pending: "A bill of attainder! What on *earth* is a bill of attain-

10 491 U.S. 397 (1989).

11 496 U.S. 310 (1990).

12 GROUND, *supra* note 1, at 186.

13 *Johnson*, 491 U.S. at 419.

14 *Eichman*, 496 U.S. at 319.

15 GROUND, *supra* note 1, at 335.

16 *Id.*

17 381 U.S. 437 (1965).

der?"¹⁸ Professor Ely responded that he ought to know since he had written many opinions rejecting bill of attainder claims, to which Justice Clark responded, "Yes, but remember what my opinions said: 'It is also argued that this is a bill of attainder. It is not.'"¹⁹

Professor Ely also shows in the course of the book that there are limits to a law clerk's persuasive powers when it comes to a Supreme Court Justice. This is illustrated by an excerpt from a memorandum he wrote to Chief Justice Warren concerning *United States v. Seeger*, which was decided on a theory Professor Ely "derided" in the memorandum.²⁰ Also included is a memorandum he sent to Chief Justice Warren concerning *Griswold v. Connecticut*, urging that the law in question not be invalidated on the basis of a violation of a general right of privacy.²¹ He notes that the Chief Justice "didn't buy a word" of his advice and "went along with the Court's right to privacy line."²²

A philosophical and humanist strand runs throughout the book, much of which resonated with my own sense of life. Thus, in the section on lying to gain career advancement, he quotes from a letter he sent to *The New York Times* in 1988: "Why can't we have a world in which accurate pictures of people are permissible, but making mistakes is too?"²³ With respect to complaints that "nothing can work" and that "no successful theory is possible," he observes:

The message . . . will be that courts needn't hang themselves up on niceties like principled decision-making. Perhaps the new realists find reassurance in that sea of idealistic young faces peering back over the student benches. I find less in a truly realistic appraisal of the ideology that is likely to issue from those faces when they've grown old enough to peer over judicial benches.²⁴

18 GROUND, *supra* note 1, at 414 n.176.

19 *Id.*

20 380 U.S. 163 (1965). The case involved a provision of a federal statute which excused training and service for a person "by reason of religious training and belief" who was conscientiously opposed to participation in war. In the excerpt contained in the book, Professor Ely urged that the Court not attempt to review the facts or define religion, God, and Supreme Being. GROUND, *supra* note 1, at 188-89. He felt that the law should have been invalidated because of a violation of the principle of neutrality by favoring a particular religion over another religion or religion over non-religion. *See id.*

21 381 U.S. 479 (1965). The case involved the constitutionality of a Connecticut statute which proscribed the sale and use of drugs and medical instruments for birth control purposes, as well as advice by physicians concerning birth control. The Court, in finding the statute unconstitutional, grounded its decision on the Fourteenth Amendment and the existence of a marital right of privacy.

22 GROUND, *supra* note 1, at 281.

23 *Id.* at 338.

24 *Id.* at 364-65.

And as for those of us who are their teachers, what could possibly be the joy in a life devoted to reiterating that nothing will work?

The format of the book is rather unique. It moves forward immediately without the usual preface and foreword or hint as to what is to come, except as divined from the Table of Contents. What unfolds are excerpts from a published book, articles, speeches, and other writings of the author, as well as excerpts from papers and memoranda he wrote in law school and as a law clerk and government official, unpublished until now. He also includes published and unpublished letters, congressional testimony of his, and a fan letter he sent to several members of the Supreme Court commenting on the Court's decision in *Planned Parenthood v. Casey*.²⁵ The book is exceptionally rich with the author's perspectives and insights. It reflects an extraordinary mind, a superb writer, a deep thinker, a seeker of what is right and just, and a person with a very good sense of humor and a wonderful compassion for the underdog and disadvantaged. In a very real sense the book is John Hart Ely's autobiography of the past almost forty years of his professional life. It has a "swan song" quality to it, though I know he is far from that, given his age (younger than I!), mind, heart, and present commitments.

I suspect that each of us has a book like this within our dreams simply as a way of recording, modestly if that is possible, what we are most proud of in our life. In the case of John Hart Ely, he has lived, in Holmes's expression, greatly in the law and responded "philosophically" and "self-sacrificing enough" to Holmes's call for a treatment of subjects that unifies "the entire body of law."²⁶ He has enjoyed a remarkable career: as a summer associate with Abe Fortas and the opportunity to help develop the strategy and brief in *Gideon v. Wainwright*;²⁷ service as a military policeman upon his graduation from Yale Law School in 1963; a position on the staff of the Warren Commission that investigated the assassination of President John F. Kennedy; a clerkship with Chief Justice Earl Warren during the 1964-65 term; a year as a Fulbright Scholar at the London School of Eco-

25 505 U.S. 833 (1992). Although opposed to the Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), he applauds the *Casey* Court for standing by that decision lest it "weaken the Court's authority immeasurably." See GROUND, *supra* note 1, at 305.

26 Book Notice, 5 AM. L. REV. 340, 341 (1871) (reviewing C.G. ADDISON, *THE LAW OF TORTS* (1870)).

27 372 U.S. 335 (1963). In that case, the Court gave expression to the rule that persons accused of crimes are entitled to counsel in both capital and non-capital cases. A most thoughtful memorandum of that experience is quoted from in the book. GROUND, *supra* note 1, at 198-203. It is a stellar example for today's law students of legal analysis, writing, and advocacy.

nomics; and several years as a public defender and co-founder of San Diego Defenders, Inc. In 1968 he launched his career in academia as an associate professor at Yale Law School. This was followed by a professorship at Harvard Law School in 1973, a brief period of service as general counsel of the United States Department of Transportation, a return to Harvard as the Ralph S. Tyler Jr. Professor of Constitutional Law, and then selection as dean and Richard E. Lang Professor at Stanford Law School in 1982. Since 1996, he has occupied the Richard A. Hausler Professorship at the University of Miami Law School.

John Hart Ely's influence and writings have been profound and monumental. There can be no question that he contributed greatly to the Supreme Court's decisions in *Gideon v. Wainwright*²⁸ and *United States v. Brown*,²⁹ gave exemplary public service in San Diego and for the United States Department of Transportation, and helped shape the debate on constitutional theory since his 1980 book, *Democracy and Distrust: A Theory of Judicial Review*.³⁰ His writings before and after this landmark work may not have been acclaimed to the same extent, but are significant and important benchmarks of their own, particularly when addressing the use of motivation in constitutional interpretation,³¹ substantive due process against the backdrop of *Roe v. Wade*,³² and the war-making powers of the Constitution.³³ Whatever one's point of view on the Constitution might be, Professor Ely has been in the forefront trying to find and articulate the proper role of the Supreme Court vis-a-vis other parts of government. He has led, educated, challenged, and provoked, earning for himself a special place in the American legal profession.³⁴

28 372 U.S. 335 (1963).

29 381 U.S. 437 (1965).

30 JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

31 See his seminal article, John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205 (1970).

32 410 U.S. 113 (1973); see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

33 The author develops these themes fully in his book, JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993). My colleague, Professor William Michael Treanor, draws on this book for his article, William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997). While agreeing with Ely's pro-Congress reading of the war-making power, Professor Treanor adds much to the discussion by developing the proposition that "the Founders gave Congress the power to start war because they believed that Presidents, out of a desire for personal glory, would be too prone to war." *Id.* at 772.

34 For one example of his influence on a new generation of academics, see the articles by Professor Treanor on the Takings Clause of the Constitution, in which he urges greater deference to the legislative process, with special protections for discrete

Because it is not possible in the limited scope of a review to cover all of the ground contained in this enormous book, I will content myself to offer comments on only a few of the subjects, including as I go references to perspectives of some of my colleagues on the Fordham Law faculty. Finally, I will end by testing how well the views of John Hart Ely have stood up in the most recent term of the United States Supreme Court, recognizing, as Ely does, that there is an ebb and flow in the history of the Court and in the nation of which it is a central part. As Professor Ely notes, even if one's views fail to gain acceptance, the effort to do so "is enough to fill a person's heart."³⁵

I. ELY'S GENERAL THEORY

Professor Ely suggests that the role of courts is to protect rights that are "designated with some specificity in a constitutional document," to protect rights of political access with respect to open-ended provisions of the Constitution such as the Ninth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment, and to ensure that the rights of minorities are "not to be treated by a set of rules different from that which the majority has prescribed for itself."³⁶ His emphasis is on access rights and equality rights, eschewing a role for the Court in protecting "society's fundamental values" or identifying constitutionally "unstated fundamental principles of substantive justice."³⁷ He confesses scepticism that a small group, such as the members of the Supreme Court, have the right answers to questions of public policy, or better answers than those that emerge in our legislative bodies. While acknowledging that the deliberations of legislative bodies are far from perfect, he believes that "nonetheless our democratic system is one that is in various ways programmed, at least roughly, to register intensities of preference."³⁸ Courts, he urges, should protect the opportunity of citizens "to participate in politics and political decisions" by leaving the product of their decisions alone. In doing so, he suggests, courts "enhance[] the autonomy" of citizens and put them in a position where they can "behave morally."³⁹ He thus says to courts:

and insular minorities. William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

35 GROUND, *supra* note 1, at 365.

36 *Id.* at 7.

37 *Id.* at 8, 24.

38 *Id.* at 14.

39 *Id.* at 9.

Enforce those rights that have inspired sufficient popular consensus to secure a place in the document. Enforce those rights that are needed to let us all freely and equally register our preferences. Enforce for minorities those rights that the majority has seen fit to guarantee for itself. Enforce all those rights with all the vigor you can muster. But beyond that, you simply have no right in a democracy—no more than philosophers or law professors or anyone else has—to tell the rest of us that we have made a mistake and that you know better.⁴⁰

Ely's representation-reinforcing approach or process-perfecting theory has provoked enormous commentary over the past almost two decades. This commentary is admirably captured in *Symposium on Democracy and Distrust: Ten Years Later*⁴¹ and in my colleague Professor James E. Fleming's thoughtful article, *Constructing the Substantive Constitution*.⁴² As noted there, critics have charged Professor Ely with a flight from substance.

Fleming takes issue with some of the criticism, arguing that Ely does not flee from substantive political theory because his is "a process-perfecting theory that perfects processes in virtue of its substantive basis in a political theory of representative democracy."⁴³ Fleming, however, does agree with the criticism that Professor Ely fails to give effect to certain substantive constitutional provisions and lays out an elaborate analysis of constitutional constructivism of his own that he claims represents a constitution-perfecting theory. Of this analysis, Ely notes:

James Fleming is surely right in noting that the syntax of the Privileges or Immunities Clause and the Ninth Amendment is most naturally that of substantive entitlement. In the end I don't think this observation fatal—it does no violence to these provisions to read them . . . as protecting rights of participation in the processes and outputs of representative government—but at least in combination with the libertarian instincts many of us share it makes the effort seem worth a try.⁴⁴

There is so much in this book which I find appealing. I am attached to John Ely's theory that we should defer more to our legislative bodies and discourage courts from inferring rights and values

40 *Id.* at 16.

41 *Symposium on Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631 (1991).

42 James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211 (1993) [hereinafter Fleming, *Constructing the Substantive Constitution*]; see also James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995).

43 Fleming, *Constructing the Substantive Constitution*, *supra* note 42, at 219.

44 GROUND, *supra* note 1, at 307.

where there are no clear benchmarks. And yet, I worry about such an approach because our political world is dominated by money and powerful special interests, and many questions important to the well-being and functioning of our democracy reach the Supreme Court. The case of *Brown v. Board of Education*⁴⁵ is just one such example. Having had the privilege of chairing a commission with a mission of exploring government integrity in my own state, I was astonished by how entrenched the status quo is and by how resistant government is to raising its own ethical standards in areas involving conflicts of interest regulation, campaign finance reform, ballot access laws, open meetings, patronage prohibitions, whistle blower protections, procurement reform, and so on.⁴⁶ The impact of money on our federal system is well-documented in the daily press concerning campaign fund raising practices of both political parties in the last presidential election. Former Secretary of State Elihu Root observed a long time ago that the reason for campaign finance reform is to prevent the great aggregations of wealth from electing members of our legislative bodies "in order to vote for the protections and advancement of their interests as against those of the public."⁴⁷ In the face of money in politics, is it really safe to remove the Supreme Court as the final interpreter with respect to the open-ended provisions of the Constitution, especially if we agree that they have substantive content? As Ely himself notes, the reflection of intensities of preferences in legislative bodies "is certainly far from perfect, money being the most obvious distorting element,"⁴⁸ leading him to question *Buckley v. Valeo*⁴⁹ and related decisions of the Supreme Court.

It is noteworthy that Ely expresses strong concern about the functioning of the legislative process in his treatment of the bill of attainder provision and war-making power, and elsewhere in the book. Indeed, in his concluding chapter he suggests that Congress has ceased being an effective policymaking alternative to the President. "Given Congress's vanishing act," he concludes, "perhaps it is a good thing that . . . the Supreme Court . . . [is] being urged . . . to drop the pretense that they shouldn't behave like legislators. . . . Might what's happening . . . [be] our best contemporary hope of approximating

45 347 U.S. 483 (1954).

46 See John D. Feerick, *Introduction* to GOVERNMENT ETHICS REFORM FOR THE 1990'S: THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY 1 (Bruce A. Green ed., 1991).

47 New York State Comm'n on Gov't Integrity, *Restoring the Public Trust: A Blueprint for Government Integrity*, 18 FORDHAM URB. L. J. 173, 173 (1990).

48 GROUND, *supra* note 1, at 13-14.

49 424 U.S. 1 (1976).

the sort of balanced system the framers envisioned?"⁵⁰ Interestingly, Professor Ely's argument for a more limited role for the Court in dealing with open-ended provisions of the Constitution contrasts with the broad view he would have the Court take of general expressions in the specific subject matter provisions of the Constitution involving bills of attainder, the freedoms of expression and religion, and in areas involving the rights of the criminally accused.

In a world of partisan politics and a clash of conflicting interests, a case can be made that the judicially created (perhaps even the work of a law clerk!) *Caroline Products* footnote,⁵¹ which has so heavily influenced the thinking of Ely, should not be seen as the full compass of the Supreme Court's role in judicial review. Thus, an important interest is served by the debate based on interpretivism, originalism, protecting fundamental rights, and reinforcing representative democracy.⁵² I have little to add to the ongoing dialogue except to note the reflections with which I left college in 1958 as a result of my "study" of the Constitution as an undergraduate political science major. I was taught that *Marbury v. Madison* stood for the proposition

50 GROUND, *supra* note 1, at 354 (citations omitted). The importance of "balance" in constructing a theory of the Constitution was ably articulated by my colleague, Professor Martin S. Flaherty, in Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

51 In *United States v. Caroline Products Co.*, 304 U.S. 144 (1938), Justice Stone set up the following framework for a more rigorous judicial review of legislative action:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at a particular religious or national or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152 n.4 (citations omitted). See the criticism of an approach based on "discrete and insular minorities" voiced by a dissenting Justice Rehnquist in *Sugarman v. Dougall*, 413 U.S. 634, 656-57 (1973) (Rehnquist, J. dissenting).

52 See generally Symposium, *Fidelity in Constitutional Theory: Editor's Forward*, 65 FORDHAM L. REV. 1247 (1997).

that it was the duty of the Court "to say what the law is,"⁵³ that *McCulloch v. Maryland*⁵⁴ made clear the importance of the Court's reviewing function in terms of civil peace, and that the Constitution was a "living, evolving" charter, as evidenced by its history since 1789. Indeed, I even find a hint of the latter in Professor Ely's discussion of the freedom of expression, where, in speaking of the reviewing function of appellate judges, he states:

I hope we have left far behind the notion that 'The Law' is a list of rules deduced in vacuo from some set of celestial principles to which the courts have access, and therefore the bringing to bear of empirical data, and arguments as to what practical effects the adoption of a given rule would have, are somehow out of order. . . . Law that does not respond to social needs cannot, nor should it, long remain law.⁵⁵

Maybe, in the final analysis, the least dangerous branch of government offers the best hope of securing our rights and liberties. On the other hand, Ely is surely right to insist that in construing the Constitution, the Court should speak with clarity in its pronouncements and prod our legislative bodies to do their job in dealing with the great moral issues of the day.

53 5 U.S. (1 Cranch) 137 (1803). Marshall's opinion for the Court noted the specialness and primacy of a written constitution, requiring courts to apply, expound, and interpret it as "the very essence of judicial duty." He added:

Could it be the intention of those who gave this power, to say that in using it, the constitution should not be looked into? . . . This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

Id. at 179.

54 17 U.S. (4 Wheat.) 315 (1819). There Marshall opined about the meaning of a written Constitution and added:

Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

Id. at 407.

55 GROUND, *supra* note 1, at 159.

II. INDICTABILITY OF THE PRESIDENT

Among the many interesting documents contained in the book is a letter, which Professor Ely did not send to *The New York Times* in 1973, taking issue with a brief filed by Solicitor General Robert Bork which argued that the President "could not be indicted prior to being impeached."⁵⁶ As I vividly recall, those were difficult days, and the prospect of President Nixon being impeached or indicted was very much in the air. It seemed to me at the time that there was a stampede going on that possibly was overlooking the fact that the President had his rights.⁵⁷ Hence, I am not sure that General Bork's reference was wholly out of line and without historical support. It bears noting that the framers of the Constitution rejected the idea of the judiciary trying cases of impeachment. Gouverneur Morris said in the Constitutional Convention debates of September 4, 1787, that "[a] conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President after the trial of the impeachment."⁵⁸ In the state ratifying debates, James Iredell said that impeachment was designed "to bring great offenders to punishment" and noted that an official who is impeached might be liable for common law punishment if the offense "be punishable by that law."⁵⁹ Moreover, Article I, Section 3 of the Constitution states that the judgment on impeachment "shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust, or Profit under the United States: but the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law."

To be sure, what is impeachable conduct and therefore within the zone of these provisions is far from clear.⁶⁰ What is clear, I suggest, is that non-indictable conduct which is not connected with the exercise of official power is beyond the scope of the impeachment power. Immunity for the President in connection with such conduct, as Professor Ely remarks, finds no support in the debates of the Constitutional Convention.

56 *Id.* at 140-41.

57 See the reviewer's articles, John D. Feerick, *President's 'Right' in Impeachment Probe*, N.Y. L.J., April 1, 1974, at 1, and John D. Feerick, *The Hastings Impeachment Acquittal*, N.Y. L.J., May 28, 1974, at 1.

58 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 500 (Max Farrand ed., rev. ed. Yale Univ. Press 1937)

59 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 113-14 (2d ed. 1941)

60 See John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1 (1970).

III. CAMPUS DISCIPLINARY RULES

I thank Professor Ely for including in his book a letter which he sent to the Stanford Campus Report in 1991 and a memorandum he sent to members of Yale University in 1971 bearing on the subject of student disciplinary investigations and proceedings. He reflects in these writings great sensitivity to the rights and concerns of students, correctly noting that disciplinary proceedings "sometimes . . . can shape the entire course of a person's life."⁶¹ It has long seemed to me that not enough attention is paid to this subject within our educational institutions from the standpoint of what is the right balance between the rights of students and the needs of a community to assure integrity. I worry at times that institutions may ignore their own responsibilities and procedures in the process of finding and pinning guilt on an accused student and fail to take advantage of the opportunity to treat an issue from an educational or pedagogical perspective. It is deplorable, in my opinion, for an institution to accuse a student and then to rush the student into a poorly crafted disciplinary proceeding without any meaningful assistance. A student thus chastized will face extreme difficulty in gaining access to postgraduate school, the professions, and government employment. Professor Ely renders an important service by reminding us that the Bill of Rights needs to have a life within our academic institutions.

IV. THE 1996/1997 SUPREME COURT TERM

Near the very end of the book, Professor Ely observes: "If the test of success is whether one's theories will gain general acceptance over time . . . then of course the odds are almost certain that each of us will fail." He adds and concludes: "Perhaps we never will get the boulder to the top of the mountain. But the struggle itself is enough to fill a person's heart."⁶² John Ely must, indeed, be pleased by the recent term of the Supreme Court, because his points of view in a number of areas were reflected in decisions of the Court.⁶³ Most conspicuous

61 GROUND, *supra* note 1, at 232.

62 GROUND, *supra* note 1, at 363-65.

63 See, for example, *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), in which the Court affirmed a decision declining to accept a proposed class of present and prospective claimants. It stated that Rule 23 "must be interpreted with fidelity to the Rules Enabling Act" and cautioned that rules of procedure "'shall not abridge, enlarge or modify any substantive right.'" *Id.* at 2252, 2244. In *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997), the Court invalidated provisions of a federal statute which prohibited the dissemination of sexually offensive material, emphasizing that even offensive speech is covered by the First Amendment and may not be suppressed. In *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996), the Court made clear that an

among the decisions was the play given to principles of federalism and separation of powers, subjects close to his heart. Some of the more interesting cases in terms of his writings are noted below.

A. *Substantive Due Process*

In *Washington v. Glucksberg*,⁶⁴ the Court held that the due process guarantee of the Fourteenth Amendment does not protect a right to assisted suicide. It acknowledged that it should be cautious in expanding substantive due process, because the concept is open-ended and there exist relatively few guideposts. It said that by declaring a right or liberty interest, it removes an issue from public debate and legislative action, running the risk of inappropriately reflecting the policy preferences of individual Court justices.⁶⁵ In identifying a right, said the Court, it must evaluate whether it is "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"⁶⁶ The Court added that although many rights protected under due process implicate these issues of personal autonomy, not all personal decisions are similarly protected because personal autonomy is not a protected right in itself.⁶⁷ The Court, therefore, reversed the Ninth Circuit and upheld a Washington state statute prohibiting assisted suicide. It concluded: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."⁶⁸ Concurring, Justice Stevens stated "that there is

indigent parent was entitled to access to an appeal, through a transcript of relevant proceedings, in a civil case involving the loss of parental rights. In so doing, it struck down a Mississippi law which conditioned the right of appeal on prepayment of record fees in the amount of approximately \$2,400. And, in *Chandler v. Miller*, 117 S. Ct. 1295 (1997), the Court found unconstitutional under the Fourth Amendment (as incorporated into the Fourteenth) a state law which required candidates for public office to pass a drug test. The Court said that the test "diminished 'personal privacy' for a symbol's sake." *Id.* at 1305. The Court added: "Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 1303.

64 117 S. Ct. 2258 (1997).

65 See *id.* at 2267–68.

66 *Id.* at 2268 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) and *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

67 See *Glucksberg*, 117 S. Ct. at 2271.

68 *Id.* at 2275.

also room for further debate about the limits that the Constitution places on the power of the States to punish the practice."⁶⁹

B. Federalism

In *Printz v. United States*,⁷⁰ the Court invalidated the Brady Act because it required individual state officials to regulate the sale of guns. The Court stated that federal laws imposing regulatory schemes upon states is not supported by the structure of the Constitution, history, and the Court's jurisprudence. It stated that such an imposition violates the concept of federalism and thereby erodes a significant structural protection of liberty by which the Constitution prevents an excessive accumulation of power in any one branch. The Court also said that such impositions violate the concept of separation of powers by denying the President his responsibility to supervise the faithful execution of the laws and represent a further accumulation of power by Congress unto itself, risking the road to tyranny against which the Constitution was designed to guard. Thus, while Congress can itself regulate the sale of guns via its commerce clause powers, the Court said that it cannot force a regulatory scheme upon state officials. Said Justice Scalia: "When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions[,] . . . it is not . . . 'proper for carrying into Execution the Commerce Clause,' and is thus, in the words of *The Federalist*, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'"⁷¹ In so finding, the Court responded to a plea contained in *On Constitutional Ground* that there should be some limits placed on the commerce power in the interest of federalism. Ely noted that "the root explanation of runaway federal power . . . is the seeming illimitability of the commerce power, for which no one has been able to define a principled cutoff, at least not one with serious teeth."⁷²

C. Presidential Immunity

In *Clinton v. Jones*,⁷³ the Court found that a sitting President does not have immunity from a private action for civil damages. In the course of its decision, the Court said that presidential immunity applies only to the performance of official functions and that such litiga-

69 *Id.* at 2304.

70 117 S. Ct. 2365 (1997).

71 *Id.* at 2379 (quoting *THE FEDERALIST* NO. 33, at 204 (Alexander Hamilton)).

72 *GROUND*, *supra* note 1, at 38.

73 117 S. Ct. 1636 (1997).

tion, as vexing as it may be, does not rise to the level of a separation of powers risk.⁷⁴ The outcome in this highly-publicized case accords with the views expressed by Ely in a 1973 memorandum to Archibald Cox on the legality of calling President Nixon before a grand jury, to wit: "The 'convention' that the president cannot be called before a grand jury, let alone that he is generally immune to the judicial process, seems very faint indeed."⁷⁵ He adds in a footnote in the book with respect to the then-pending *Clinton v. Jones* lawsuit: "We've come far enough toward the sort of regal presidency the framers abhorred without effectively immunizing behavior of the sort alleged"⁷⁶

D. Religious Freedom

Three cases involving the religion clauses of the Constitution are noteworthy because of the element of federalism expressed by the outcomes in the cases. In *City of Boerne v. Flores*,⁷⁷ the Court invalidated the Religious Freedom Restoration Act of 1993, which was passed in response to the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*.⁷⁸ In *Smith*, the Court upheld an Oregon statute prohibiting the use of peyote, among other narcotics, in the face of a free exercise challenge by Native Americans. In its *Boerne* decision, the Court said that it alone had the power to declare the constitutional right to free exercise of religion and that Congress does not have the power to alter the substantive meaning of the Constitution's guarantee in this area. Such power would enable legislative majorities to evade the amendment process and place legislative acts on the same level as constitutional provisions. The Court concluded that there was no need for so sweeping an act as that passed by Congress imposing such burdens upon states.

In *Timmons v. Twin Cities Area New Party*,⁷⁹ the Court upheld a law of Minnesota prohibiting fusion candidacies through the vehicle of multi-party nominees. Although First and Fourteenth Amendment associational rights were implicated, the Court found the burdens imposed by the state law to be of a lesser variety and not sufficient when balanced against the regulatory interests of the state. The Court stated: "States certainly have an interest in protecting the integrity,

74 *Id.* at 1645-50.

75 GROUND, *supra* note 1, at 138.

76 *Id.* at 415 n.183.

77 117 S. Ct. 2157 (1997).

78 494 U.S. 872 (1990).

79 117 S. Ct. 1364 (1997).

fairness, and efficiency of their ballots and election processes as means for electing public officials."⁸⁰

In *Agostini v. Felton*,⁸¹ the Court found that providing services on parochial premises under Title I of the Elementary and Secondary Act of 1965 did not constitute an excessive entanglement with religion. The Court said that it had rejected the notion in earlier cases that a public employee on sectarian premises is presumed to inculcate religion in her work and symbolizes a union between church and state.⁸² It noted that the public aid in question reached sectarian institutions as a result of private decisions and that the services were provided based on neutral criteria. Quite clearly, the Supreme Court has adopted the theory and language of neutrality suggested by Professor Ely with respect to its treatment of the religion clauses.⁸³

E. Reverse Discrimination

In *Abrams v. Johnson*,⁸⁴ the Supreme Court held that race cannot be a predominant factor in drawing district lines favorable to minorities. The Court upheld a plan formulated by the district court which contained only one majority-minority district, instead of two as preferred by the state legislature, because creating a second would have amounted to subordinating the state's traditional districting policies and considering race predominately. Given his thoughtful treatment of the subject of reverse discrimination, Professor Ely would not have been surprised by the outcome in this case, although he has suggested a different approach in reviewing racial classifications that advantage minorities:

When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking. A white majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of whites relative to those of others, or to overestimate the costs of devising an

80 *Id.* at 1373.

81 117 S. Ct. 1997 (1997).

82 *See id.* at 2010.

83 In *On Constitutional Ground*, Professor Ely notes that "[t]here is no constitutional bar to helping or hindering religious persons or groups along with otherwise similarly situated persons or groups. Deviation from neutrality occurs only when religion or a religion is singled out for advancement or inhibition." *GROUND*, *supra* note 1, at 195.

84 117 S. Ct. 1925 (1997).

alternative classification that would extend to certain whites the advantages generally extended to blacks.⁸⁵

In contrast to what the Court did in *Abrams*, Ely has observed: "Measures that favor racial minorities pose a difficult moral question that should, by one method or the other, be left to the states. There is nothing suspicious about a majority's discriminating against itself, though we must never relent in our vigilance lest something masquerading as that should in fact be something else."⁸⁶

In the coming term of the Supreme Court⁸⁷ the issue of affirmative action will present itself, and Professor Ely's views on that subject will have an important test. On this subject, he has written: "[I]f we are to have any hope of defeating racial prejudice we will, at least for a time, have to take race into account for some purposes"; and:

[T]he question is whether the negative educative effects of using racial criteria to overcome centuries of discrimination are so inevitable, and so threatening, as to outweigh the good that such programs may accomplish. It is a difficult question, but the basis for an affirmative answer can hardly be secure enough to support an absolute declaration of constitutional impermissibility.⁸⁸

V. CONCLUSION

I am grateful for the opportunity to review this book. It has renewed my passion for constitutional law and for delving into constitutional theory. But more than that it has made me appreciate more fully one of America's greatest constitutionalists and an outstanding member of the legal profession. John Hart Ely can be rightly proud of the role he has played as a lawyer and teacher and of his own contributions to making "the American Dream more broadly accessible than it had ever been before."⁸⁹ I applaud him for this volume and wish him continued heavy lifting in the law. I know that there are many issues of contemporary interest on which he has not yet published a view. Given the esteem in which he is held by all who know him and

85 GROUND, *supra* note 1, at 272.

86 GROUND, *supra* note 1, at 275; see also James Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974). For a most thoughtful treatment of increasing the representation of minorities in the Senate, see the article by my colleague, Professor Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1 (1996).

87 *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996), cert. granted, 65 U.S.L.W. 3354, 3849, 3860 (U.S. June 27, 1997) (No. 96-679).

88 GROUND, *supra* note 1, at 273, 274.

89 *Id.* (speaking of Chief Justice Earl Warren).

by others like me from afar, I await with interest his future writings, in whatever form.